THE MODERN LAW OF REAL PROPERTY IN NEW YORK.

HERE in New York, as elsewhere, the actual conditions of the law of real property are the result of certain historic forces. Although originally a Dutch settlement, New York, soon after the English conquest in the year 1664, possessed a system of laws and institutions much more closely resembling those of England than those of New England. When the English had subdued New Netherland, they at once promulgated the laws of England with an explicitness not observable in the other American plantations. It was obviously the intention of the governing authorities to get rid of the Dutch laws as soon as possible. Consequently few of them survived the year 1700, and those only by force of treaty or compact. For a time after 1664 the Dutch *ante-nati* had a sort of personal, as contradistinguished from the territorial, law.[1] With the death, or the naturalization, of the *ante-nati*, their personal law disappeared, and now but three or four unwritten laws of Dutch origin linger on in the jurisprudence of New York.

Not only the laws, but the institutions, of England flourished in New York, and when the War of Independence broke out, even the manorial system of England had taken firmer hold and borne better fruit in this province than elsewhere in America, with the possible exception of Prince Edward's Island, in the Gulf of St. Lawrence, where it lasted until very recent days.[2] Land in the Province of New York was all held of the Crown, by the tenure of free and common socage, as of the King's Manor of East Greenwich, in Kent. The first Constitution of the State not only

[1] Cf. Savigny, Roman Law in the Middle Ages. London, Edit. 1829, p. 99.

[2] Prince Edward's Island presents the first instance of a legislative expropriation of landlords. This was followed afterwards by the Irish acts, where the proceedings in Prince Edward's Island were closely followed by the law officers of the Crown.

expressly adopted the English law of real property in force in the Province of New York at the date of the battle of Lexington and Concord, but it also confirmed all existing estates in land, held under Crown grants.[1] Thus, by a series of enactments the English law of real property in force in the Province of New York was translated into the new order of things.

While the common law of England furnished the law of estates in New York until the War of Independence, there were even in colonial days some few points of departure in non essentials. The simpler economic and social conditions prevailing in a colony did not require the elaborate legal machinery of the parent State and there was a visible tendency in New York to resort to the simpler and more ancient phases of the national law. Sugden, in his introduction to Gilbert's "Uses and Trusts," states that "simplicity was the striking feature of the common law, in regard as well to the estates which might be created, as to the modes by which they might be raised."[2] It was not until about the year 1700 that an increasing subtlety and complexity in the forms of conveyancing began to set in in England.[3] But the colonies—and New York was no exception—generally ignored these late inventions of the English conveyancers, adhering to the simpler and more antique modes. With this exception the English law was generally followed, and one of the first law books published in New York was an original "Essay on the Theory and Practice of Fines."[4] On most other subjects the Bar depended wholly on the old English law books, and there were some admirable conveyancers and "black-letter lawyers" among the colonial barristers of New York.

A French jurist, Ortolan, has observed that political revolutions make few changes in the outward forms of laws and institutions, but that they sow the seeds of immense and comprehensive change. The truth of this observation

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[1] Secs. xxxv, xxxvi, Constitution of 1777.

[2] Sudgen's Gilbert. x London Edit., 1811.

[3] Wood, Preface to the "Institute of the Laws of England." London Edit., 1772. Lord Mansfield in Case of Buckworth, in the K. B., 1 Hargrave's Collectanea Juridica, 335.

[4] By William Wyche; published by Rivington, New York, 1794.

is apparent in the instance of New York. The revolutionary government by resolutions simply transferred the "seigniory" and the "quit rents" of the Crown to the political abstraction, called the State.[1] The lands themselves long continued to be held of the State as successor to the Crown and by the tenure of free and common socage. Not until the year 1787 was any part of the lands in the State declared to be allodial and then only that portion newly granted under the great seal of the State.[2] It was not until 1830 that the Revised Statutes finally abolished tenure and declared all lands allodial.[3]

Prior to the year 1830, the reforms made in the common law of real property had not been very radical, if we except the law abolishing primogeniture, and establishing new canons of descent.[4] It is true, fees tail, or estates tail, had been converted by an act of the Legislature, passed in 1782 into fees simple.[5] But as that act simply accomplished what might be then accomplished by a disentailing assurance, the particular reform was not very marked or consequential.

That the English law, which continued the basis of the land law of this State, was largely feudal in origin is very familiar, as it is conceded by all the commentators. It has been truly said "that the most elementary conceptions of the English law of real property carry us back to the relations of lord and vassal, and cannot be understood without reference to them." At the time of the adoption of the first constitution of this State,[6] the feudal origin of the contemporaneous English land law was much more apparent than at present, when juridical theories of "contract" have come to dominate those archaic legal obligations once due to "status." Sir Henry Maine has emphasized the fact "that the movement of all progressive societies has been a movement from status to contract.[7] The truth of this

[1] Journal of Provincial Convention I, 554; 1 J. & V., 44, Sec. 14.

[2] 2 J. & V., 67.

[3] 1 R. S., 718, Sec. 3.

[4] 1 J. & V., 245. C. 2, Laws of 1782. C. 12, Laws of 1786.

[5] C. 2, Laws of 1782; Chap. 12, Laws of 1786.

[6] April, 1777.

[7] Maine Ancient Laws, 165.

observation is apparent in the real property law of England. The division between "free" and villein tenures, no doubt, once accurately corresponded to a division according to status of the population of England.[1] The term "estate" once served to indicate the status of a tenant, just as did that other term "freeholder." But as we wish to speak here of the fact that many legal rights and duties which the common law once imputed to status or tenure are now imputed to contract by the modern law of this State, it is not necessary to follow in detail the emergence of new legal concepts from primitive forms. It will be necessary only to indicate certain general doctrines of the common law which have been wholly extirpated by the reforms instituted in this State.

The common law of land adopted by the first constitution of New York originally took no direct notice of land as property. By that law a tenant of land had only an estate or interest in it—the king was the sole allodial proprietor. Although such estates in the colonies had then recently become assets for creditors and liable even for simple contract debts of decedents,[2] the law itself still bore many marks of a system formulated at a time when land was not property and when rights and obligations regarding land were considered as privileges due to *status*. So it contained many rules regarding the limitations of future estates which were of distinctly feudal origin. The motive of the Revised Statutes was not only to abolish these rules but to place land in its true position as immovable property, and to make of conveyances contracts.

The first radical change made in the theory of our ancient law of real property by the Legislature of New York was the partial abolition of "tenure" by the Act of 1787.[3] Thereafter all lands granted by the State under its great seal were to be allodial, notwithstanding that all the occupied lands, granted originally by the Crown, or held

[1] Challis, R. P., 6, 7.

[2] By act of the British Parliament, 5 Geo. II, c. 7, lands in the colonies were made assets for simple contract creditors. But until 1774 in New York neither heirs nor devisees were liable for even specialty debts of ancestor after they had aliened their estates. Chap. 12, N. Y., Laws of 1774.

[3] 2 J. & V., 67.

of it, were to continue to be held of the State by the old tenure of free and common socage. The fact that such lands were "in tenure" of itself then implied by the common law that the rights and obligations due to "tenure" were to be continued. It is true that after the Statute 12, Car. II, c. 24, abolishing the burdens of the military tenures and converting such tenures into the tenure by free and common socage, the worst features of feudal tenures had disappeared. But the legal term "tenure" still continued to denote the specific feudal relation between a "lord" and a "tenant,"[1] while on the existence of tenure depended certain legal rights and reciprocal obligations—whenever there was a tenure "fealty" was due, and the lord might distrain.[2] The partial abolition of tenure made it necessary to modify this principle, or the allodial owner would have been deprived of any effectual remedy for his rent due and unpaid. When the courts announced that the right of distraint for socage services was independent of tenure,[3] the last vestige of legal obligations arising out of mere *status* was swept away in New York and made to depend upon contract. It is hardly necessary to point out that this was a departure from the principles of the common law and subversive of many ancient conceptions of legal rights and remedies. That it was a wise departure is apparent, for it led to the declarations in the Revised Statutes abolishing every remnant of tenure and making all land allodial.

The substance and effect of this extraordinary change is well pointed out by the Court of Appeals in the case of Van Rensselaer *v.* Dennison[4], where it is said, "Since the Act of 1787 * * * these rules * * * which were of feudal extraction or resulted from the obligations arising out of the feudal relation, are now abrogated. But, in all the decisions of this Court bearing upon the subject, careful attention has been given to the important distinction between conditions, implied by the law of feudal tenures and those which the parties to a grant expressly mention and create in the conveyance. Any condition of

[1] Atty. Genl. of Ontario *v.* Mercer, 8 App. Cas., 767, 772.
[2] Cornell *v.* Lamb, 2 Cow., 652.
[3] Cornell *v.* Lamb, 2 Cow., 652.
[4] 35 N. Y., 393.

the latter kind is valid if consistent with the general rules of law * * * . This is wholly independent of tenure." While the Court was in reality commenting on the New York re-enactment of the Statute of Quia Emptores, the language itself shows that judicial conceptions had outstripped the contents of the common law and were prepared to enforce all the obligations between landlord and tenant or tenant and reversioner, upon the theory of "contract." The modern English books and cases can show no such advance in legal principle.

Before considering another reform instituted by the Revised Statutes it may be well to point out that the distinction, at first made for historical reasons, in the Roman law, between a "contract" and a "conveyance," has no actual place in the jurisprudence of the common law. The classification of the classical jurists exclude "conveyances" from "contracts" [1] not because a conveyance may never be a contract, but because it happened that their conveyances universally gave rise to rights *in rem* and their contracts, to rights *in personam*. In the common law no such distinction exists. Thus a sale of chattels is always regarded by common lawyers as both a contract and a conveyance—consequently after the Statute of Uses when conveyances of land might be effected simply by deed, the deed is always regarded as both a contract and a conveyance,[2] and this remains true, even where the deed is pursuant to a contract of sale. With this explanation we may proceed to the reform in question.

The Revised Statutes wholly abolished feoffment with livery of seisin[3] as a mode of conveyance, and placed all future conveyances of land upon the basis of other specialty contracts and conveyances. Feoffment with livery was the oldest form of conveyance, according to the common law. There is reason to believe that at its origin it was regarded by the feudists as a public ceremony defining the *status* of the tenant, and only incidentally conferring rights over land. The charter or deed of feoffment, prior to the

[1] Dig., 50, 16, 67.

[2] Co. on Litt., 1716; 2 Washburn Real Prop., 553 (1st Edit.); Preston, Shep. Touch., 50.

[3] 1 R. S., 738, Sec. 136.

Statute of Frauds, had little title to be regarded as a part of the conveyance, as it was used to record rights rather than to create them. Yet, long prior to the Statute of Frauds, the charter or deed of feoffment was habitually used in connexion with livery of seisin, and at a time when the entire English law of contract was in a most rudimentary condition, concerned with goods and chattels only, and not with land[1]. Consequently, even mediæval English lawyers never came to associate a charter of feoffment with other specialty contracts. Perkins, in his Profitable Book, after the Statute of Uses, distinctly contrasts deeds of feoffment with other deeds of conveyances, although deeds of bargain and sale had then come to be regarded as contracts, or from the point of view of other specialty contracts. Consequently, we find the new contract doctrine of consideration[2] applied to all conveyances not operating by transmutation of possession[3], but never to feoffments with livery. The last conveyance in New York by feoffment with livery of seisin took place only shortly before the adoption of the Revised Statutes in 1830[4].

The very distinguished and able lawyers who framed the Revised Statutes of New York, having made all lands allodial, or property in the highest sense of the term, desired to place all future conveyances of land upon the same foundation as the other specialty contracts and conveyances known to the common law. They consequently abolished for the future conveyances by feoffment with livery of seisin and substituted therefor the simple 'grant' or deed under seal[5], which, according to their conceptions, coincided with former deeds of bargain and sale[6]. Their intention to expel from the law of this all feudal obligations founded upon *status*, and to place real estate in the category of "immovable property," which it only

[1] Cf., 1 Pollock & Maitland, History of English Law, 34; 2 *Ibid.*, 1 2 *et seq.*

[2] This doctrine dates from the year 1425. Jenks' Law and Politics in the Middle Ages, 282–287; History of Consideration, Chapter III.

[3] Preston's, Sheppard's Touchstone, 510; Abstracts of Title III, 13; Hargrave's Note, 310. Co. on Litt., 48*a*; Wood *v.* Chapin, 13 N. Y., at p. 517.

[4] McGregor *v.* Comstock, 17 N. Y., at p. 169.

[5] 1 R. S., 738, Sec. 137.

[6] 1 R. S., 739, Sec. 142.

imperfectly was by the theory of the common law is very manifest from the provisions noticed. Deeds or grants had theretofore no special reference to conveyances of corporeal hereditaments; they were appropriate modes to transfer all kinds of property, whether movable or immovable.[1] By adopting the common deed as the sole future form of conveyance and by the abolition of feoffments with livery of seisin, the revisers did much to simplify conveyancing in New York and to do away with the distinction between "grant" and "livery" and between real property and personal property—a distinction utterly unknown to the Roman law. Since then the delivery of the deed—the legal inception of all alienatory contracts in writing—plays a more important part in our law of conveyancing.[2] At common law the date of the delivery of the deed of land was inconsequential, as title dated from the delivery of seisin only,[3] while after the Statute of Uses a covenant to stand seised might be effectual without delivery.

The more important reforms made by the Revised Statutes in the common law of real property related to the creation of future estates in lands. In their attempt to deal with this subject the revisers were confronted with three separate sets of rules regulating the limitation of future estates in lands. The oldest arose in the days of feudalism and governed "legal limitations" or "assurances, good by the common law." The second related to "uses," and depended on the Statute of Uses and its judicial exposition. The third set of rules was concerned with "executory devises" and depended on the Statute of Wills and its construction. These various rules were not always consistent with each other, and consequently a limitation might be valid if contained in one instrument, and void if contained in another. The reason for this inconsistency, of course, depended on the exigencies of a historical jurisprudence. In the great conservative nations of history the ancient or common law is always expressly abrogated with much reluctance, although necessity frequently changes it by a re-

[1] Blewitt *v.* Boorum, 142 N. Y., at p. 360.

[2] 1 R. S., 732, Sec. 738; Chauncey *v.* Arnold, 24 N. Y., 330, 335; People *v.* Bostwick, 32 N. Y., 445; Mitchell *v.* Bartlett, 51 N. Y., 447.

[3] Challis, R. P., 83.

sort to fiction or other indirection. Thus, in theory, the ancient law stands unchanged, and yet, in fact, inconsistent practices are fully legalized. It is not, however, of these trite facts we wish to speak, but of the way the revisers dealt with the inconsistent rules mentioned.

In retaining the old term "estate" to denote allodial property in lands, the revisers were not inconsistent, for the Statute had somewhat qualified the allodial character of such lands by the declaration that the original and ultimate property of all such lands was to remain in the State, and that they were to continue subject to escheats.[1] Thus, the ownership of lands remains, in so far as the sovereign is concerned, a qualified interest and is therefore properly designated, even since the Revised Statutes, by the old common-law term "estate." The Revised Statutes did not profess otherwise to change the law relating to estates in possession, but were intended to regulate the creation of future estates in lands, so as to produce simplicity and uniformity in the laws. In order to accomplish this purpose the revisors were not forced to invent new rules, but rather to select and make uniform in operation the best of the old rules relating to uses and executory devises, whether such rules were of legal or equitable origin.[2] This selection accomplished, the abolition of the ancient rules relating to legal limitations naturally followed, if they had been founded for purely feudal reasons. The result of this method of re form was a tolerably complete code of laws regulating the creation and the alienation of estates in lands.[3]

Prior to the Statute of Uses, 27 Hen. viii, c. 10, the rules of the common law regulating the limitation or creation of future estates were few. No remainder could be limited in expectancy on a fee simple.[4] Abeyance of the seisin by

[1] 1 R. S., 718, Secs. 1, 3, now since 1846 in Article I, Constitution.
[2] Reviser's Note to Article I. Tit. 4, Chap. I, Part II, R. S.
[3] Chap. I, Part II, R. S.
[4] There is some uncertainty in the old law concerning whether a remainder could have been limited on a determinable fee or on a conditional fee. Challis was of the opinion that no remainder could be limited on either a determinable or a conditional fee (Challis, R. P., 64). But Lord Hardwicke did not agree with him as to a remainder on a determinable fee (Hargrave Collect, Jurid. I, 383); nor did Bracton coincide concerning the validity of a limitation of a remainder on a conditional fee (Law Quar. Rev. VI, 22). But Mr. Challis' opinion is always entitled to the greatest weight, as he was a master of both law and logic.

act of the parties was forbidden, for the feudal or early common law required that the tenancy should always be full so that there might be some one to do the lord's bidding or respond to process in real actions. From this fundamental legal rule were deduced the subordinate rules, that no estate of freehold could be limited to take effect *in futuro* except by way of remainder, nor could it be so limited as to exist at intervals and not continuously. For the same reason the legal rules regulating the limitation or creation of estates by way of remainder became very strict. A contingent remainder of freehold could not be limited on a term of years, as this would put the seisin in abeyance. But after the Statutes of Uses and Wills such a limitation, though void in any assurance taking effect only by the common law, was good as a use or as an executory devise. So a fee might in effect be limited in remainder on a fee if limited as a use or a devise. Thus the validity of limitations came to depend on the nature of the instrument containing them.

The New York revisers, in the year 1630, wholly abrogated all the distinctions indicated, permitting a freehold estate to begin *in futuro* and a contingent remainder to be limited on a term of years, or a fee to be limited on a fee, provided such limitations took effect within the time prescribed by their new rule against perpetuities.[1] Up to this point, as it will be perceived, the effect of the reform, instituted by the Revised Statutes, was to abolish the rules regulating legal limitations, or those contained in assurances taking effect by the common law, and to extend the application of the newer rules regulating uses and executory devises to all instruments creating future estates. But as uses and executory devises were subject to the rule against perpetuities, the revisers distinctly provided that every limitation of an expectant estate should conform to their new or revised rule against perpetuities[2] Thus the new rule came to play a much more important part in the law of conveyancing than the old rule had played in the common law, for that rule had arisen subsequently to the common law

[1] 1 R. S., 724, Sec. 24.
[2] 1 R. S., 724, Secs. 14, 15, 16, 20.

rules regulating legal limitations and had no relation to them. The common law had provided a scheme of its own against perpetuities,[1] and until the rise of uses and executory devises, the rule against perpetuities had not been heard of, and, as Challis points out, its extension to legal limitations always "implies an anacronism which may be said to trench on absurdity."[2] Such also was the opinion of Lord St. Leonards,[3] while this opinion of these masters of the law of real property has not escaped a challenge from very respectable sources[4] it is safe to assume that it will prevail, as the more recent investigations and authorities tend only to corroborate it.[5] But whether or not the old rule against perpetuities applied to contingent remainders, the revised rule in New York was made applicable to all limitations of future estates if they were inalienable beyond the time limit.

We have stated that the new rule againt perpetuities, as formulated by the revisers of New York, has become the great test of the validity of any limitation of a remote future estate. But it is not the sole test, for several subordinate rules in harmony with it were directed against the limitation of successive estates for life. By the common law any member of successive life estates might be limited to persons *in esse*. The revisers reduced the indefinite number to two and cut off the subsequent life estates by accelerating the vesting of the remainder in fee.[6] In like manner they restricted the limitation of remainders, de-

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[1] *e. g.*: An estate could not be limited to the right heirs (as purchasers) of a person not *in esse* (2 Rep., 51 a, b; 2 Bl. Com., 170) for this was "a double possibility" which was illegal. This rule has very recently been held independent of the Rule against Perpetuities (Whitley *v.* Mitchell, 42 Ch. D., 494; 44 Ch. D., 85, 90; Law Quar. Rev., XIV., 133), contrary to the express opinion of Prof. Gray of Harvard, and in agreement with the opinion of the late Mr. Challis.

[2] Challis, R. P., 159, 160.

[3] 4 D. & War., 1, 27; 2 H. L. C., 186.

[4] Lewis, Perpetuities, Chap. XVI, and supplement of 1849, p. 97; Gray Rule against Perp., pp. 80, 81, 205; Law Quar. Rev., XIV, 234.

[5] Cf. Challis, R. P., 159, 160; Williams, Jurid. So. Papers, I, 45, and Maitland Law Quar. Rev., VI, 23; Pol. & Mait., Hist. Eng. Law II, 23, as to the dispute concerning the antiquity of contingent remainders and their judicial recognition prior to the Rule against Perpetuities.

[6] 1 R. S. 723, Sec. 17.

pending on estates the *pur autre vie*, or lives of nominees not connected with the legal title, by reducing the permissible lives to two.[1] The new rule against perpetuities permitted the power of alienation to be suspended for two lives in being and in a single case for an actual minority beyond the dropping of the life of the surviving *cestui que vie*.[2] Such minority was never, however, a term in gross as at common law, but always an actual minority of a person *in esse* at the extinction of the second permissible life. Thus the real reform of the Revised Statutes consisted in reducing the period prescribed by the common law rule against perpetuities from any number of lives in being to two, and the term of twenty-one years in gross to an actual minority.

The revisers' attempt to remodel the old rule against perpetuities constrained them to define a perpetuity. For the first time in the history of common law countries a legislative definition of a perpetuity was consequently formulated, with the result of occasioning an ultimate departure in New York from the later decisions of the courts of many other common law jurisdictions. At the time of the enactment of the Revised Statutes the legislative definition in question probably reflected accurately enough the consensus of judicial opinion even in England. But at a later day it in some way ceased to embody what the English judges conceived to be the test of a perpetuity. The revised statutes define a perpetuity as the unlawful suspension of the power of alienation,[3] thus making the suspension of the power of alienation the true test of a perpetuity. That this definition was then in accordance with the opinion of distinguished common lawyers there can be no question. Sugden in the year 1811 had stated that "a perpetuity may, at this day, be described to be such a limitation of property as renders it inalienable beyond the period allowed by law,"[4] and this statement he frequently reaffirmed. In his argument in Cadell *v.* Palmer he laid it down as an incontrovertable proposition "that the old law

[1] R. S. 724, Secs. 18, 19.

[2] 1 R. S. 723, Secs. 14, 15, 16.

[3] 1 R. S. 723, Secs. 14, 15, 16.

[4] Sugden's note to Gilbert on Uses, London Edit. of 1811, p. 260; and see Fearne, C. R., 430; Sanders' Uses and Trusts, I, 196 (Amer. Edit. I, 202).

raised no objection to estates granted in perpetuity provided there was a power to bar them or destroy them so as to render them alienable."[1] In this statement he only conformed to earlier judicial opinion.[2]

At the present day in England and some other jurisdictions the old common law rule against a perpetuity seems to have undergone a subtle change, and it is boldly stated that the object of the rule "is not the prevention of property from inalienability."[3] According to this school of lawyers the rule is one directed against remoteness of vesting, and, consequently, if a future estate vest beyond the period laid down by the rule in question, the limitation containing it is void, even though such estates may be presently barred or aliened by persons in being of their own motion and without resort to courts of judicature.[4] This opinion certainly finds judicial sanction in modern English cases,[5] and yet we detect that earlier conception of a perpetuity which was adopted by the Revised Statutes of New York, emerging in a recent case. In the year 1883 Lord Blackburn distinctly intimated that in his opinion a present power to alienate was inconsistent with the legal notion of a perpetuity.[6] It is not possible that so great a Judge should have been inadvertent on so fundamental a point of law. But whatever the definition may be elsewhere, in New York the Revised Statutes alone determined what is a perpetuity.

Since the Revised Statutes of New York, a present power to alienate is incompatible with a perpetuity.[7] Consequently, no matter how remote a future estate may be in vesting, if it is susceptible of immediate alienation, the statute against perpetuities has no reference to it.[8] What has

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[1] 1 Cl. and F., 372.

[2] 1 Salk, 229; 1 Cha. Ca., 23.

[3] Marsden, Perpetuities, Chap. III.; Gray, Rule against Perpetuities, Chap. VII, and Sec. 600.

[4] Marsden, Perpetuities, Chap. III; Gray, Rule against Perpetuities, Chap. VII.

[5] *In re* Hargreaves, L. R. (43 Ch. D.), 401, 406.

[6] Withaus *v.* Vane, L. R. (9 App. Cas.).

[7] 1 R. S., 723, Secs., 14, 15.

[8] Murphy *v.* Whitney, 140 N. Y., 541, 546; Williams *v.* Montgomery, 148 N. Y., 519, 526; Stoiber *v.* Stoiber, 40 App. Div., 156.

been said is, perhaps, sufficient to indicate that in New York the older legal conception of a perpetuity has survived in practice. That this conception may be carried to extreme lengths, probably beyond the intention of the framers of the Revised Statutes, a recent case only serves to show.[1] But, as the doctrine of that case may yet have "its wings clipped," as the learned Mr. Challis expressed it, when it comes before the final appellate tribunal, it is unnecessary to discuss it in this connection. It is well understood that, by virtue of a provision of the statute which forbids alienation by a trustee, certain express trusts in New York are within the rule against perpetuities.[2] In Mills *v.* Mills,[3] the case in question, the declared trust certainly contravened this rule. But, by virtue of a recent statute, whenever a remainderman assigns or releases his interest to a *cestui que trust* entitled to the income and profits of an intervening trust estate, the *cestui que trust* may now put an end to the trust.[4] In view of this statute, the Court held, in Mills *v.* Mills, in substance, that the trust was without the rule against perpetuities, because the remainderman and the *cestui que trust* were capable, *eo instanti*, of destroying the trust. The trust could not, therefore, be said to suspend the power of alienation.

The Revised Statutes abolished all the old distinctions between uses, executory, devises and legal limitations[5]. Thereafter all instruments of conveyance were subject to the same rules and if a future estate did not violate the revised rule against perpetuities or the new rules regulating the limitations of successive life estates or estates *pur autre vie*, it could hardly fail for technical reasons. No future estate could be avoided on the ground of the impossibility of the contingency on which it was to take effect[6]. Subject to the revised rule against perpetuities only, freeholds might be created to commence *in futuro;* contingent remainders might be limited on terms of years and a fee limited on a

[1] Mills *v.* Mills, 28 Misc., 633; affd., 50 App. Div., 221.
[2] Murphy *v.* Whitney, 140 N. Y., 541, 546.
[3] 50 App. Div., 221.
[4] Chap. 452, N. Y. Laws of 1893.
[5] 1 R. S. 726, Sec. 42.
[6] 1 R. S. 724, Sec. 26.

fee[1]. These provisions of the statute were so destructive of all the principles formerly regulating the limitation of future estates that they may be said to have created a new science, were it not for the retention of the common law in all cases not expressly provided for by the statute. To harmonize these new rules with the old system of conveyancing has not been without difficulties in practice. But its solution has been satisfactory on the whole and has resulted in a system of conveyancing certainly simpler than that which it superseded. Whether it would not have been desirable to go still farther and abrogate the old law entirely, is the only question which troubles those who have given much attention to the plan and the scope of the Revised Statutes concerning real property.

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[1] 1 R. S. 724, Sec. 24.